

BEFORE THE FOREST PRACTICES APPEALS BOARD  
STATE OF WASHINGTON

SNOHOMISH COUNTY,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT  
OF NATURAL RESOURCES;  
DEPARTMENT OF ECOLOGY and FOREST  
PRACTICES BOARD; GOLDEN SPRING  
INTERNATIONAL, INC.; TAT (USA)  
CORPORATION; and WEYERHAEUSER  
COMPANY,

Respondents.

WASHINGTON ENVIRONMENTAL COUNCIL,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT  
OF NATURAL RESOURCES;  
DEPARTMENT OF ECOLOGY and FOREST  
PRACTICES BOARD; GOLDEN SPRING  
INTERNATIONAL, INC.; TAT (USA)  
CORPORATION; and WEYERHAEUSER  
COMPANY,

Respondents.

FPAB No. 89-12

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

FPAB No. 89-13

1 This matter came on for hearing before the Forest Practices  
2 Appeals Board, William A. Harrison, Administrative Appeals Judge,  
3 presiding, and Board Members Norman L. Winn, Chairman, Claudia K.  
4 Craig and Dr. Martin R. Kaatz.

5 The matter is an appeal from Department of Natural Resource's  
6 approval of forest practices applications by Golden Spring  
7 International, Inc., and TAT (USA) Corporation.

8 Appearances were as follows:

9 1. Snohomish County by Edward E. Level and Traci M. Goodwin,  
10 Deputy Prosecuting Attorneys.

11 2. Washington Environmental Council by Michael W. Gendler and  
12 Jean M. Mischel, Attorneys at Law.

13 3. Department of Natural Resources by Kathryn L. Gerla,  
14 Assistant Attorney General.

15 4. Forest Practices Board by Patricia Hickey O'Brien, Assistant  
16 Attorney General.

17 5. Department of Ecology by Ceil Buddeke, Assistant Attorney  
18 General.

19 6. TAT (USA) Corporation by William F. Lenihan and James  
20 McAteer, Attorneys at Law.

21 7. Golden Spring International, Inc., by Bart G. Irwin, Stephen  
22 E. Oliver and George L. Wood, Jr., Attorneys at Law.

23 8. Weyerhaeuser Company by Mark S. Clark and Ann Forest Burns,  
24 Attorneys at Law.

25  
26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER

FPAB Nos. 89-12 & 89-13

(2)

1 The hearing was conducted at Everett from September 11 through  
2 15, and at Seattle from September 18 through 22 and September 25  
3 through 27, 1989. In all, thirteen days were devoted to the hearing  
4 on the merits.

5 Reporter Gene Barker & Associates provided court reporting  
6 services.

7 Witnesses were sworn and testified. Exhibits were examined. The  
8 Board viewed the site of the proposal in the company of Judge Harrison  
9 and the parties. From testimony heard and exhibits examined, the  
10 Forest Practices Appeals Board makes these:

#### 11 FINDINGS OF FACT

##### 12 I.

13 This case arises in Snohomish County in the vicinity of Lake  
14 Roesiger. The area is one of low elevation (below 1,000 feet m.s.l.)  
15 and fertile forest soils. The old growth timber was harvested from  
16 the areas in the early part of this century. The main old growth  
17 harvest was from 1925 to the late '30's. During that harvest a saw  
18 mill was built on Lake Roesiger, which was used as a mill pond for log  
19 storage.

##### 20 II.

21 In 1949, Sound Timber Company sold lands around Lake Roesiger to  
22 Weyerhaeuser Company. Weyerhaeuser has managed its land for forestry,  
23 and has harvested parts of the second growth timber nearly every year  
24 since 1970.

25  
26 } FINAL FINDINGS OF FACT,  
27 } CONCLUSIONS OF LAW AND ORDER

FPAB Nos. 89-12 & 89-13

(3)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

III.

Over the years Lake Roesiger shorelines have become built up with both summer and permanent homes. Homes now occupy nearly all of Lake Roesiger's waterfront. The homeowner's property extends back from the lake. It is abutted on its upland boundaries by timber company ownership.

IV.

Lake Roesiger has major algal blooms during the summer. Its water quality is characterized by low alkalinity rendering it sensitive to nutrient loading. Nutrients (such as nitrogen and phosphorus) stimulate algal growth. Because of this, both Snohomish County and the State Department of Ecology have supported a study to determine the sources of nutrient loading that contribute to the Lake's stagnation.

V.

In early 1989, Weyerhaeuser Company sold land west of Lake Roesiger, totaling 2,600 acres to Golden Spring International, Inc. (GSI). At the same time it sold land east of Lake Roesiger, totaling 5,200 acres to TAT (USA) Corporation (TAT). The GSI property contained some 1,575 acres of merchantable second growth timber. The TAT property contained some 3,000. A network of logging roads was in place on both properties.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

VI.

The GSI property encompasses much of the western slope of the Lake Roesiger basin and extends westward to the area drained by the West Fork of Woods Creek (the upper reaches of which are known as Carpenter Creek). The TAT property encompasses much of the eastern slope of the Lake Roesiger basin and extends eastward to the area drained by Woods Creek. The West Fork of Woods Creek and Woods Creek converge northeast of Monroe before entering the Skykomish River. Lake Roesiger drains by Roesiger Creek to Woods Creek.

VII.

In March, 1989, TAT, under approvals issued by the State Department of Natural Resources (DNR) clearcut approximately 458 acres of its holdings.<sup>1</sup> Approximately 90 acres was in the Lake Roesiger watershed and the balance in the watershed of Woods Creek. Cutting was conducted to the property line of adjacent homeowners. Because these applications were classified as Class III, the approval of DNR was made without evaluation as to whether or not a detailed statement must be prepared pursuant to the State Environmental Policy Act (SEPA), chapter 43.21C RCW. Neither was an inter-disciplinary team (ID Team) formed to advise DNR under the Timber-Fish-Wildlife agreement negotiated among persons and entities interested in forestry.

---

<sup>1</sup> Application numbers FP1910528 and FP 1910529.

VIII.

This clearcutting in the Lake Roesiger watershed raised concerns among Lake Roesiger residents, Snohomish County and Department of Ecology. These were communicated to DNR.

IX.

On May 2, 1989, GSI filed four applications (known by the last three digits of their numbers as 713, 716, 717 and 750) with DNR seeking approval to clearcut approximately 1,175 acres. On May 17, 1989, TAT filed two applications (known as 776 and 777) with DNR seeking approval to clearcut approximately 395 acres.

X.

The GSI land is zoned R-5 (residential, one dwelling unit per 5 acres). The TAT property is zoned Forestry (one dwelling unit per 20 acres). Each application specifies that reforestation will occur by planting or seeding Douglas fir or similar conifer species. DNR consulted with Snohomish County over the prospect for urbanization of the area within 10 years which, if likely, could lead to County responsibility for SEPA compliance. See RCW 76.09.070 and WAC 222-16-050(2)(b). Such a determination also exempts the lands from reforestation. See WAC 222-34-050. Snohomish County did not request a determination that the lands at issue would urbanize within 10 years. Based upon this and the lack of sewers and other infrastructure near Lake Roesiger, DNR chose not to classify the six May applications as Class IV - General under WAC 222-16-050(2).

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

FPAB Nos. 89-12 & 89-13

(6)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

XI.

The lands in question are not known to contain a breeding pair or nest or breeding grounds of any threatened or endangered species. For this reason and because the six applications of GSI and TAT did not contain any of the five forest practices enumerated at WAC 222-16-050(1) as Class IV - Special, DNR classified the six applications as Class III under WAC 222-16-050(5). Having so classified the applications, DNR did not evaluate whether or not a detailed statement (EIS) must be prepared pursuant to SEPA.

XII.

Next, pursuant to DNR procedure with regard to Class III applications, DNR applied principles of the Timber-Fish-Wildlife agreement to identify "priority" issues. From these an ID Team of persons with technical training was assembled to advise DNR on the applications. The priority issue identified by DNR on GSI's applications was "Harvest - Unstable Soils." The priority issues identified by DNR on TAT's applications were "Water Quality" and "Extreme Fire Hazard."

XIII.

On May 18, 1989, an ID Team of five technical core members and twenty observers representing the landowners, Snohomish County and others walked portions of the site. From this, the ID Team gave advice which was placed in a DNR written report. There remained, however, an uncertainty as to whether these applications would be

1 followed by others. Therefore, DNR asked GSI and TAT to convene a  
2 public meeting in which they would discuss their present and future  
3 logging plans. These were requested by DNR in the spirit of the TFW  
4 agreement largely in the hope of avoiding future conflict, but not as  
5 part of the ID Team procedure nor necessarily for the action about to  
6 be taken on the pending permits. Apparently DNR's view of the  
7 meetings therefore differed from the understanding of Snohomish County  
8 and others who believed the meetings would allow public comment that  
9 DNR would consider in acting upon the applications.

10 XIV.

11 The GSI meeting was held on June 7, 1989, at Everett. Officials  
12 of GSI declared then that it was GSI's intent to log all 1,575 acres  
13 of merchantable timber in two years. The TAT meeting was held on June  
14 8, 1989, at Everett. Officials of TAT declared then that it was TAT's  
15 intent to log all 3,000 acres of merchantable timber in two years.  
16 The applications at issue were therefore the first acreages within  
17 these totals. The result of each meeting was a listing of concerns  
18 about proposed operations.

19 XV.

20 In pursuit of its understanding, Snohomish County and others  
21 submitted comments on or after June 15 to DNR concerning the  
22 presentations at the two meetings in Everett. In pursuit of its  
23 understanding, DNR officials had by then, however, already met with  
24

25  
26 ; FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

27 FPAB Nos. 89-12 & 89-13



1 GSI and TAT officials on June 12, 1989, to discuss the written ID Team  
2 report and possible permit approval. Two time extensions had been  
3 granted by the applicants to DNR which expired on June 19, 1989. Had  
4 the DNR not acted by June 19, 1989, the original applications without  
5 conditions would have been automatically approved. On June 19, 1989,  
6 DNR approved with conditions the six GSI and TAT forest practices  
7 applications at issue.

8  
9 XVI.

10 The DNR approval of the applications was made with numerous  
11 conditions based upon DNR's investigations including the ID Team  
12 procedure. The first of these conditions "deleted" from the  
13 application the area within the Lake Roesiger basin. This was defined  
14 with regard to the hydrographic boundary so that all lands draining  
15 toward the Lake were excluded. The hydrographic boundary was marked  
16 on the ground. The "deletion" constituted a denial without prejudice  
17 to re-applying at a future date. The denial deleted a total of  
18 approximately 640 acres so that GSI's applications for 1,175 acres was  
19 approved for approximately 725 acres and TAT's applications for 395  
20 acres was approved for approximately 205 acres.

21 XVII.

22 Additional conditions of DNR's approval were in part set by DNR  
23 and were in part volunteered by the landowner. These included 25 foot  
24 buffers or leave areas to either side of type 4 and 5 streams. See

1 e.g. Exhibit R-21 herein, (716), General Condition 8. A type 5 stream  
2 may be intermittent and the width between its ordinary high water mark  
3 is less than two feet. A type 4 stream exceeds two feet in width  
4 between ordinary high water marks, and has significance mainly in  
5 protecting downstream water quality where significant fish use may  
6 occur. See WAC 222-16-030(3), (4) and (5). No machinery is allowed  
7 within these buffers under the permit conditions. However,  
8 merchantable timber may be removed with careful yarding. A similar  
9 buffer, known as a riparian management zone, was required along Type 3  
10 streams or ponds. See, e.g. Exhibits R-21, herein (716), General  
11 Condition 10. More leave trees are required than for type 4 or 5  
12 streams by this condition. A type 3 water is one where significant  
13 fish use may occur. See WAC 222-16-030(3).

#### 14 XVIII.

15 On the GSI applications, conditions also require upland  
16 management areas in the vicinity of selected type 3 waters. See,  
17 Exhibit R-21, herein (713 and 716). A similar requirement will be  
18 imposed upon a beaver pond area in 713 previously thought to be  
19 deleted by the Lake Roesiger hydrographic boundary, but later found to  
20 lie outside the boundary. The conditions require consultation with  
21 the State Department of Wildlife as to how many and what type of leave  
22 trees should be included. See, Exhibit R-21, herein (716), General  
23 Condition 7.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
XIX.

Also on GSI applications, certain steep areas are subject to operating conditions. On Exhibit R-21, herein, (717) a buffer of up to 50 feet is required along a type 5 stream in a deep valley. Specific Condition 3. On Exhibit R-21 (750) no ground based machinery will be allowed west of the road where slopes descend steeply to a type 5 water. Specific Condition 2.

XX.

On the TAT application, additional slash abatement may be required so that no more than 800 contiguous acres of slash five years old or younger are left. Exhibit R-21, herein, (777) Specific Condition 2. See WAC 332-24-385 setting 800 acres as a threshold of extreme fire hazard.

XXI.

Following the applications' approval by DNR, Snohomish County commenced a lawsuit against DNR and the applicants in Thurston County Superior Court. The Court heard, upon affidavits, Snohomish County's motion for a temporary restraining order and granted same on June 29, 1989. The temporary restraining order lasted until July 13, 1989. On July 10, 1989, Snohomish County filed an appeal before this Board from the granting of the applications. By further order entered July 13, 1989, the Court extended its temporary restraining order until July 18, 1989. On July 18, 1989, William A. Harrison, Administrative

1 Appeals Judge of this Board heard, upon affidavits, Snohomish County's  
2 motion to suspend these application approvals pending this Board's  
3 final decision. Judge Harrison granted that motion and the motion of  
4 TAT to bring the matter on for expedited hearing before the full  
5 Board. On July 20, 1989, the court dismissed the Snohomish County  
6 action.

7  
8 XXII.

9 The evidence adduced at hearing in this matter can be categorized  
10 into five major subject headings. These concern the effect of the  
11 proposed logging on: 1) wetlands, 2) streams and fisheries, 3)  
12 wildlife, 4) county roads, and 5) fire danger.

13  
14 XXIII.

15 Wetlands. Snohomish County has not adopted a wetland  
16 protection ordinance. Were such an ordinance adopted it would likely  
17 govern the protection of wetlands from building development. However,  
18 a draft of such an ordinance provides for a buffer of 25 feet from the  
19 limit of wetlands, outward. This is in contrast to DNR's buffers, as  
20 prescribed for these forest practices, which protect, generally, to  
21 the limit of the wetland. In addition the draft County proposal would  
22 not allow buffer disturbance while DNR's buffers allow removal of  
23 merchantable timber and careful yarding out of the buffer. We find  
24 that the DNR conditions are protective of wetlands in this case. Such  
25 buffers on type 5 streams, predominant at this site, extend beyond the

26  
27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

FPAB Nos. 89-12 & 89-13

(12)

1 requirements of the forest practice regulations. See WAC  
2 222-30-020(5) and (7).

3 XXIV.

4 Streams and Fisheries. Carpenter Creek, which drains the area  
5 of GSI's proposed logging, contains habitat which supports coho  
6 salmon, steelhead, rainbow and cutthroat trout. Downstream reaches  
7 contain pink, chum, and chinook salmon. The same is true of Woods  
8 Creek up to a natural waterfall. The Department of Fisheries plants  
9 coho salmon above the waterfall. The main stems of Carpenter - West  
10 Fork Woods and Woods Creeks are adjacent or near to some of the  
11 proposed cuts and tributaries to these streams are on the site.

12 XXV.

13 Stream temperature is not likely to be affected significantly by  
14 the proposed logging.

15 XXVI.

16 The soil in the areas to be logged is resilient. Soil is  
17 unlikely to be compacted so as to increase runoff in that way, because  
18 of low impact logging equipment. Both GSI and TAT propose the use of  
19 a "feller-buncher" which cuts the trees with a large scissors  
20 apparatus while holding it with a mechanical arm. The cut tree would  
21 then be yarded with rubber-tired skidders. Soil compaction is likely  
22 to be minimized by these operations.

1 XXVII.

2 There is likely to be a 20% increase in water yield from the  
3 site, due to the proposed logging, for 5 years after harvest. In five  
4 years the highly productive soils will grow reproduction trees to a  
5 height of at least 5 to 6 feet. However, during the 5 years the  
6 absence of forest canopy and evapotranspiration by trees will account  
7 for the greater water yield.

8 XXVIII.

9 The soil at the site is absorptive. The increased water yield  
10 will leave the site chiefly by absorption into the soil and  
11 subterranean movement to stream beds. It is unlikely that direct  
12 surface runoff of rainfall will cause sedimentation to streams on or  
13 off-site. Moreover, the subterranean water yield may lengthen the  
14 duration of peak winter stream flows, but it is unlikely to cause bank  
15 erosion or sedimentation. The evapotranspiration of trees being  
16 greatest in summer, it is possible that low summer stream flows would  
17 be increased by the logging. Despite this, there is not likely to be  
18 any measurable flow increase, as a result of the proposed logging, at  
19 the convergence of the West Fork of Woods Creek and Woods Creek.

20 XXIX.

21 Nutrient loading to streams from logging does not pose a threat  
22 of stagnation as may be the case with Lake Roesiger.

23 XXX.

24 The effects of this proposal, even cumulatively, considered with  
25

1 prior clearcuts are not likely to cause significant sedimentation nor  
2 harm to fish habitat either in on-site streams or in Carpenter - West  
3 Fork Woods or Woods Creeks.

4 XXXI.

5 Wildlife. There may be some 100 common species of wildlife in  
6 or near the site. More species generally inhabit a clearcut than  
7 second growth forest, however. Moreover, the proposed logging is  
8 likely to leave viable populations of all species. Within some  
9 species, such as common songbirds, numbers of individuals are likely  
10 to decline. The same is true for Douglas squirrels. When trees  
11 regenerate numbers of these species will probably increase again.  
12 Within other species, such as deer and grouse, numbers of individuals  
13 are likely to increase. Deer density is quite likely to increase  
14 shortly after harvest and remain above second-growth deer densities  
15 for more than 20 years.

16 XXXII.

17 The concern for forest "fragmentation," by which scattered  
18 clearcuts may leave stands too isolated for wildlife utilization was  
19 not shown to be an adverse factor here. While the fragmentation  
20 concept has been applied in old growth habitat involving cavity  
21 nesting or other species, it was not shown that these operations, in  
22 low-land, second growth habitat, would result in any forest  
23 fragmentation posing significant harm to wildlife.

1 XXXIII.

2 The effects of this proposal, even cumulatively considered with  
3 prior clearcuts are not likely to cause significant harm to wildlife  
4 populations.

5 XXXIV.

6 County Roads. In 1988 Snohomish County began a "spot  
7 improvement" system to repair county roads in response to complaints  
8 filed. Some 400 complaints were filed in 1988 throughout the County.  
9 Only a few related to problems connected with forestry. The Lake  
10 Roesiger area has been subject to logging for many years, yet the road  
11 damage in that area is comparable to the rest of the County. It is  
12 not likely that the proposed logging will cause damage to county  
roads. Logging truck traffic has been routed off of the Lake Roesiger  
14 Road. It is not probable that logging truck traffic from the proposal  
15 will unduly congest county roads.

16 XXXV.

17 Fire Danger. With denial of the harvest plan in the Lake  
18 Roesiger hydrographic boundary, the clearcuts in question do not equal  
19 or exceed the 800 acre threshold for extreme fire hazard cited  
20 previously in WAC 332-24-385. If such an acreage arises, however,  
21 slash abatement procedures will be required. There is no plan to burn  
22 slash in these proposed operations. The proposed logging does not  
23 constitute a fire hazard.



1 XXXVI.

2 At the conclusion of the evidence, respondents GSI and TAT moved  
3 for dissolution of the order suspending these applications. Judge  
4 Harrison granted the motion with concurrence of all members of this  
5 Board.

6 XXXVII.

7 Any Conclusion of Law which is deemed a Finding of Fact, is  
8 hereby adopted as such. From these Findings of Fact, the Board makes  
9 these

10 CONCLUSIONS OF LAW

11 I.

12 Jurisdiction. As a threshold matter, the Department of Natural  
13 Resources (DNR) and the Forest Practices Board (FPB) have filed a  
14 pre-hearing motion in which they assert that we lack jurisdiction to  
15 review the consistency of forest practices regulations with the Forest  
16 Practices Act, chapter 76.09 RCW, and the State Environmental Policy  
17 Act, chapter 43.21C RCW when such regulations were applied in a permit  
18 action which is brought before us for review. We disagree. We hold  
19 that we have such jurisdiction in contested cases involving permit or  
20 enforcement actions.

21 II.

22 The challenge regarding our jurisdiction has been previously  
23 litigated and concluded by the Order of Dismissal entered by the  
24 Superior Court of Thurston County on July 20, 1989. That matter  
25

26 FINAL FINDINGS OF FACT,  
27 CONCLUSIONS OF LAW AND ORDER

FPAB Nos. 89-12 & 89-13

(17)

1 concerned the same cause of action as here and involved most of the  
2 same parties, including the DNR and the FPB. Upon motion of  
3 plaintiff, Snohomish County, a Temporary Restraining Order was granted  
4 prior to the Dismissal. The Temporary Restraining Order recited that  
5 " . . . the FPAB does not have authority to consider the  
6 constitutional and rule validity questions raised in the plaintiff's  
7 complaint," and was entered on June 29, 1989, or 21 days before the  
8 action was dismissed. We were apprised of both that lawsuit and that  
9 order for the first time on the day after the order was entered. In  
10 direct succession we filed, through counsel from the Office of the  
11 Attorney General, a brief amicus curiae with the Thurston County  
12 Superior Court. In it, and by appearance of counsel, we requested  
13 that the Court forebear from exercising jurisdiction until the matter  
14 was heard in this forum. As friend of the court we advised that:

15       Where, however, contested cases involve challenges to  
16 rules, the administrative tribunal should at least be  
17 given the initial opportunity to hear the facts, and  
18 interpret the rules and statutes to determine their  
19 applicability. If the quasi-judicial tribunal concludes  
20 that a particular rule is beyond the authority of an  
environmental statute which the board is called upon to  
interpret, then the agency likewise also ought to have the  
opportunity to rule, subject to de novo review in Superior  
Court.

21       Amicus Curiae Brief of Forest Practices Appeals Board, pp  
22       7-8.

23       Thereafter, on July 20, 1989, the Court entered an Order of  
24  
25

26       FINAL FINDINGS OF FACT,  
27       CONCLUSIONS OF LAW AND ORDER

FPAB Nos. 89-12 & 89-13

(18)

1 Dismissal. That Order recited:

2 " . . . that Snohomish County has an adequate  
3 administrative remedy of appeal to the FPAB on all issues  
4 and that the County has filed an appeal before the FPAB  
relating to all issues and primary jurisdiction lies with  
the Forest Practices Appeals Board."

5 Page 2, lines 12 through 18.

6  
7 The Court, when fully advised, specifically expunged language from the  
8 proffered order which styled it a "partial" dismissal excepting  
9 "challenges to the validity of SEPA statutes and regulations and  
10 forest practices statutes and regulations." This Order of Dismissal  
11 constitutes a binding adjudication that we possess the jurisdiction at  
12 issue.

### 13 III.

14 Assuming, without conceding, that the Thurston County Superior  
15 Court's Order of Dismissal is not binding we also set forth our own  
16 conclusions concerning our jurisdiction.

### 17 IV.

18 First, the Forest Practices Appeals Board (FPAB) is an  
19 independent, quasi-judicial tribunal, of record, within the State  
20 Environmental Hearings Office.<sup>2</sup> RCW 76.09.210(1). The FPAB

21  
22  
23 <sup>2</sup> The State Environmental Hearings Office is composed of four  
quasi-judicial boards which are independent of the agencies whose  
24 actions may be appealed. The boards are: 1) the Shorelines Hearings  
Board, 2) the Pollution Control Hearings Board, 3) the Forest  
25 Practices Appeals Board, and 4) the Hydraulics Appeals Board.

1 consists of three members appointed by the Governor with the advice  
2 and consent of the Senate. RCW 76.09.210(2). Members shall be  
3 qualified by experience and training in pertinent matters pertaining  
4 to the environment. One member shall have been admitted to the  
5 practice of law in this state and shall be engaged in the legal  
6 profession at the time of his appointment. Id. Members may be  
7 removed by action of a tribunal of three judges of superior court  
8 designated by the Chief Justice of the Supreme Court. RCW  
9 76.09.210(4).

10 V.

11 Second, the legislature has delegated to the FPAB, the  
12 responsibility to hear appeals by any county from DNR's approval of a  
13 forest practices application in that county. RCW 76.09.050(8).  
14 Similarly, the legislature has delegated to the FPAB the  
15 responsibility to hear the appeal of any person aggrieved by approval  
16 or disapproval of a forest practices application, RCW 76.09.220(8), or  
17 issuance of enforcement orders. RCW 76.09.080(2), RCW 76.09.090(3),  
18 and RCW 76.09.170.

19 VI.

20 Third, nothing within the authority delegated by the legislature  
21 confines the FPAB's review to DNR's compliance solely with forest  
22 practices regulations. To the contrary, the task of the DNR in  
23 carrying out permit actions includes the responsibility to assure  
24

1 compliance with the Forest Practices Act. This is expressly stated in  
2 the context of this appeal by RCW 76.09.050(5):

3       The department of natural resources shall notify the  
4 applicant in writing of either its approval of the  
5 application or its disapproval of the application and the  
6 specific manner in which the application fails to comply  
with the provisions of this section or with the forest  
practice regulations. . . . (Emphasis added.)

7 Other appeals may similarly bring other portions of the Act before  
8 us. Our jurisdiction, on review of DNR's approval of the application,  
9 is equally inclusive of both the Forest Practices Act and its  
10 regulations under the authority granted us by RCW 76.09.050(8) and  
11 -220(8).

12                               VII.

13       Next, jurisdiction to review the permit action for consistency  
14 with both the Forest Practices Act and the regulations necessarily  
15 results in jurisdiction to conclude upon whether a regulation at issue  
16 is beyond the authority of the Act. All is then reviewable in  
17 Superior Court. Were it not so, an invidious system of dual  
18 litigation would result in which a single permit would be measured  
19 against regulations in this forum and simultaneously measured against  
20 the Forest Practices Act in Thurston County Superior Court. Appeal  
21 from the FPAB could conceivably be to a different Superior Court.  
22 Applications to preserve the status quo during litigation could be  
23 filed in two or more forums. We see nothing which compels such a  
24

25  
26 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

27 FPAB Nos. 89-12 & 89-13

(21)

1 result. Rather, our jurisdiction is tailored to grant relief on all  
2 but constitutional issues with a subsequent and orderly right to  
3 review in Superior Court.

4 VIII.

5 Lastly, we distinguish the contested case before us from the  
6 action authorized by RCW 34.04.070. That portion of the  
7 Administrative Procedure Act, and its successor RCW 34.05.570(2),  
8 provide for a declaratory judgment on the validity of a rule "when it  
9 appears that the rule or its threatened application interferes with or  
10 impairs or immediately threatens to interfere with or impair the legal  
11 rights or privileges of the petitioner." This provision grants  
12 permission to bring a declaratory judgment petition, and the same must  
13 be brought exclusively in Thurston County Superior Court. Sim v.  
14 Parks and Recreation Department, 90 Wn.2d 378 (1978), Harvey v. Board  
15 of County Commissioners, 90 Wn.2d 473 (1978). In the terms adopted in  
16 Seattle v. Department of Ecology, 37 Wn. App 819 (1984) it is an  
17 appeal from "law making" as contrasted with "law applying." The  
18 Pollution Control Hearings Board determined that it lacked  
19 jurisdiction in Seattle v. Department of Ecology, a case challenging  
20 the validity of regulations adopted, but not yet applied. This  
21 appeal, by contrast, is a contested case under RCW 34.04.090, et. seq.  
22 (RCW 34.05.410, et. seq.) of the Administrative Procedure Act which  
23 relates to "law applying." The appeal is from a permit approval  
24  
25

1 supported by specific regulations placed at issue. A challenge to an  
2 administrative rule when actually applied is not forbidden by RCW  
3 34.04.070. See, Weyerhaeuser v. Department of Ecology, 86 Wn.2d 310  
4 (1976) (Pollution Control Hearings Board declares a tax credit  
5 regulation invalid in the course of reversing denial, by Department of  
6 Ecology, of a tax credit certificate to Weyerhaeuser Company); Simpson  
7 Timber Company v. Olympia Air Pollution Control Authority, 87 Wn.2d 35  
8 (1976) (Pollution Control Hearings Board declares regulations of the  
9 air pollution control authority to be statutorily preempted in appeal  
10 of a civil penalty issued pursuant to those regulations; State v.  
11 Rains, 87 Wn.2d 626 (1976) (Clallam County Superior Court invalidates  
12 a rule of the Public Disclosure Commission in an enforcement action  
13 for civil penalty by PDC against Mr. Rains); Bellevue v. Boundary  
14 Review Board, 90 Wn.2d 856 (1978) (Boundary Review Board reviews and  
15 upholds the validity of a timely filing rule in contested annexation);  
16 Frame Factory v. Department of Ecology, 21 Wn. App. 50 (1978)  
17 (Pollution Control Hearings Board declares valid a regulation of the  
18 Department of Ecology relating to removing a catalytic converter from  
19 an automobile in an appeal of civil penalty assessed under that  
20 regulation); Puget Sound Air Pollution Control Agency v. Kaiser  
21 Aluminum, 25 Wn. App. 273 (1980) (Pollution Control Hearings Board  
22 declares valid a regulation of the air pollution control agency  
23 against a claim that scienter is required by statute in appeal of a  
24  
25

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

FPAB Nos. 89-12 & 89-13

(23)

1 civil penalty assessed under that regulation); Downtown Traffic  
2 Planning v. Royer, 26 Wn. App. 156 (1980) (King County Superior Court  
3 declares the validity of SEPA exemption regulation in an action  
4 challenging a Seattle proposal put in place under the exemption);  
5 Chemithon Corp. v. Puget Sound Air Pollution Control Agency, 31 Wn.  
6 App. 276 (1982) (Pollution Control Hearings Board declares the  
7 validity of a regulation of the air pollution control agency in appeal  
8 of a civil penalty assessed under that regulation); Kaiser Aluminum v.  
9 Pollution Control Hearings Board 33 Wn. App. 352 (1982) (Pollution  
10 Control Hearings Board declares valid a regulation of the air  
11 pollution control agency in an appeal of a civil penalty assessed  
12 under that regulation); and Asarco, Inc. v. Puget Sound Air Pollution  
13 Control Agency, 112 Wn.2d 314 (1989) (Pollution Control Hearings Board  
14 declares valid regulations of the air pollution control agency and  
15 Department of Ecology in an appeal of a civil penalty assessed under  
16 the regulations.)

17 The Shorelines Hearings Board has similarly reviewed and ruled  
18 upon the validity of regulations relative to the Shoreline Management  
19 Act when placed at issue in appeals from the granting or denying of  
20 shoreline permits. See, Massey v. Island County, SHB No. 80-3, SAVE  
21 v. Koll Company, SHB No. 81-27, CFOG v. Skagit County, SHB No. 84-17,  
22 Friends of the Columbia Gorge v. Skamania County, SHB Nos. 84-57 and  
23 84-60, Hastings v. Island County, SHB No. 86-27 and Risk v. Island  
24 County, SHB Nos. 86-49 and 50.

6 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

27 FPAB Nos. 89-12 & 89-13

(24)



IX.

In summary, we have jurisdiction to review and determine whether a forest practices regulation, applied in support of permit or enforcement action on appeal before us, exceeds the statutory authority granted by the Forest Practices Act.

X.

Rule Validity. Appellant Snohomish County challenges the validity of WAC 222-16-050, a forest practices regulation which classifies those forest practices which are subject to the State Environmental Policy Act (SEPA). The regulation provides, in pertinent part:

- (1) "Class IV - special." Application to conduct forest practices involving the following circumstances requires an environmental checklist in compliance with the state environmental policy act (SEPA), and SEPA guidelines, as they have been determined to have potential for a substantial impact on the environment. It may be determined that additional information or a detailed environmental statement is required before these forest practices may be conducted.
  - \*(a) Aerial application of pesticides to an "area of water supply interest" as determined according to WAC 222-38-020(5)(i).
  - (b) Harvesting, road construction, site preparation or aerial application of pesticides:
    - (i) On lands known to contain a breeding pair or the nest or breeding grounds of any threatened or endangered species; or
    - (ii) Within the critical habitat designated for such species by the United States Fish and Wildlife Service.
  - (c) Widespread use of DDT or a similar persistent insecticide.
  - (d) Harvesting, road construction, aerial application of pesticides and site preparation on all lands within the boundaries of any national park, state

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

FPAB Nos. 89-12 & 89-13

(25)

1 park, or any park of a local governmental entity,  
2 except park managed salvage of merchantable  
forest products.

- 3 \*(e) Construction of roads, landings, rock quarries,  
4 gravel pits, borrow pits, and spoil disposal areas  
5 on slide prone areas as defined in WAC  
6 222-24-020(6) when such slide prone areas occur  
7 on an uninterrupted slope above a Type 1, 2, 3 or  
8 4 Water where there is potential for a  
substantial debris flow or mass failure to cause  
significant impact to public resources.

9 The regulation was promulgated by the Forest Practices Board.<sup>3</sup>

#### 10 XI.

11 The regulation was adopted in implementation of RCW 76.09.050(1)  
12 of the Forest Practices Act and parallel language at RCW 43.21C.037 of  
SEPA. The pertinent part of the Forest Practices Act provides:

13 The [forest practices] board shall establish by rule  
14 which forest practices shall be included within each of  
the following classes:

15 Class I . . .

16 Class II . . .

17 Class III: Forest Practices other than those  
18 contained in Class I, II or IV . . .

19 Class IV: Forest Practices other than those  
20 contained in Class I or II: . . . d) which have a  
21 potential for a substantial impact on the environment  
22 and therefore require an evaluation by the department  
23 as to whether or not a detailed statement must be  
prepared pursuant to the state environmental policy  
act, chapter 43.21C RCW. . . .

24 Forest practices under Classes I, II and III are  
25 exempt from the requirements for preparation of a detailed  
statement under the state environmental policy act.

26 RCW 76.09.050(1) (Brackets and emphasis added.)

---

27 <sup>3</sup> Department of Ecology has co-adopted subsections 1(a) and (e) of  
the above rule under RCW 76.09.040.

1 The pertinent portions of SEPA<sup>4</sup> provide:

2 1) Decisions pertaining to applications for Class I,  
3 II and III forest practices as defined by rule of the  
4 forest practices board under RCW 76.09.050 are not subject  
5 to the requirements of RCW 43.21C.030(2)(c) as now or  
6 hereafter amended.

7 2) . . . .

8 3) Those forest practices determined by rule of the  
9 forest practices board to have a potential for a  
10 substantial impact on the environment, and thus to be  
11 Class IV practices, require an evaluation by the  
12 department of natural resources as to whether or not a  
13 detailed statement must be prepared pursuant to this  
14 chapter. . . .

15 RCW 43.21C.037 (Emphasis added.)

## 16 XII.

17 When reviewing the validity of a forest practices rule we will  
18 review to determine whether the regulation exceeds the statutory  
19 authority granted by the Forest Practices Act. Established principals  
20 governed our review. Where the legislature has specifically delegated  
21 rule-making power to an agency, the regulations are presumed valid.  
22 Weyerhaeuser Co. v. Department of Ecology, 86 Wn.2d 310 (1976). One  
23 asserting invalidity has the burden of proof, and the challenged

---

24 <sup>4</sup> Our jurisdiction to review the consistency of a forest practices  
25 regulation for consistency with SEPA arises not only from the Forest  
26 Practices Act's requirements regarding SEPA, but from SEPA itself.  
27 See RCW 43.21C.060 by which SEPA supplements all existing  
authorizations of all branches of government. See, also, review for  
SEPA compliance in permit appeals by the Pollution Control Hearings  
Board, e.g. Asarco v. Air Quality Coalition, 92 Wn.2d 685 (1979) and  
the Shorelines Hearings Board, e.g. Nisqually Delta Association v.  
DuPont, 95 Wn.2d 563 (1981).

1 regulations need only be reasonably consistent with the statutes they  
2 implement. Weyerhaeuser, supra. However, agency rules and  
3 regulations cannot amend or change legislative enactments. State v.  
4 Rains, 87 Wn.2d 626, 631 (1976) and cases cited therein. Rules must  
5 be written within the framework and policy of the applicable  
6 statutes. State Employees v. Personnel Board, 87 Wn.2d 823, 827  
7 (1976) and cases cited therein. An agency created by statute has only  
8 those powers expressly granted or necessarily implied from the  
9 statute. Human Rights Commission v. Cheney School District, 97 Wn.2d  
10 118, 125 (1982) and cases cited therein.

11 XIII.

12 The Legislature has delegated to the Forest Practices Board the  
13 authority to classify forest practices relative to SEPA. However,  
14 this delegation was made with the statutory directive, underscored  
15 above, that forest practices "which have a potential for a substantial  
16 impact on the environment" shall require an evaluation by DNR as to  
17 whether or not a detailed statement must be prepared pursuant to SEPA.

18 XIV.

19 Words in a statute should be given their ordinary meaning absent  
20 ambiguity or a statutory definition. Garrison v. State Nursing Board,  
21 87 Wn.2d 195, 196 (1976) and cases cited therein. Extrinsic aids to  
22 interpret statutory language may be considered even without a showing  
23 that the language is ambiguous. Garrison, supra. One such aid is the  
24

25  
26 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

27 FPAB Nos. 89-12 & 89-13

(28)

1 dictionary, Id. The statutory phrase "potential for a substantial  
2 impact on the environment" is not ambiguous<sup>5</sup> nor specially defined.  
3 The key word is "substantial." Webster's Third New International  
4 Dictionary (1971) defines "substantial" as follows: "consisting of,  
5 relating to, sharing the nature of, or constituting substance:  
6 existing as or in substance: material . . . : real, true . . . :  
7 important, essential."

8 XV.

9 The language of WAC 222-16-050(1) classifies as Class IV -  
10 Special only five circumscribed forest practices as having the  
11 potential for a substantial impact on the environment. In the context  
12 of this case, we have concluded that the cumulative effects of the  
13 proposed clearcutting do not pose a potential for a substantial impact  
14 on the environment. However, the effect of WAC 222-16-050(1) is to  
15 declare conclusively that, excepting timber harvests in parks or on  
16 lands containing the breeding grounds of threatened or endangered  
17 species, no timber harvesting regardless of size, timing, soil type,  
18 slopes, elevation, equipment usage or other factors could create even  
19

---

20 <sup>5</sup> We decline to construe the Forest Practices Act language  
21 "potential for a substantial impact on the environment" by reference  
22 to points of inquiry in the Legislative Journals. Where the language  
23 of the statutes is clear and unambiguous it requires no construction or  
24 interpretation. Thompson v. Lewis County, 92 Wn.2d 204, 207 (1979)  
25 and cases cited therein. Compare, Human Rights Commission v. Cheney  
School District, 97 Wn.2d 118, 121 (1982) and cases cited therein.

1 the potential for a substantial ("material, real, true, important,  
2 essential") impact on the environment. Such a regulation is not  
3 reasonably consistent with the Forest Practices Act or SEPA provisions  
4 cited. Rather, it is beyond the framework and policy of those  
5 statutes as set forth at RCW 76.09.050 and RCW 43.21C.037. See also  
6 RCW 76.09.010.

7 XVI.

8 Our conclusion in this regard is consistent with the Supreme  
9 Court's comment upon WAC 222-16-050 in footnote 2 of Noel v. Cole, 98  
10 Wn.2d 375 (1982). The regulation was then materially the same as now  
11 when the Supreme Court stated:

12 . . . WAC 222-16-050 defines all harvesting of timber, with  
13 minor exceptions not applicable here, as a class 3 forest  
14 practice, which SEPA itself exempts from the EIS requirement.  
15 RCW 43.21C.037. While SEPA does authorize the promulgation of  
16 administrative exemptions, they are limited to actions which are  
17 not major actions significantly affecting the quality of the  
18 environment. See RCW 43.21C.037; RCW 43.21C.110(1)(a). SEPA  
19 cannot be construed to allow the creation of general exemptions  
20 which apply regardless of environmental effect, for this would  
21 permit administrative agencies to gut the statutes. Cf. In re  
22 George, 90 Wn.2d 90, 97, 579 P.2d 354 (1978) ("administrative  
23 agency may not, by interpretation, amend or alter the statutes  
24 under which it functions"). At the least, administratively  
25 created exemptions must be construed to apply only when the  
26 particular action in question is not a major action significant -  
27 by affecting the environment. See, Downtown Traffic Planning  
Comm. v. Royer, 26 Wn. App. 156, 164-65, 612 P.2d 430 (1980)

21 . . . .

1 Although speaking in dicta,<sup>6</sup> the Supreme Court's comments remain  
2 pertinent.

3 XVII.

4 Our attention has been drawn to the comments of Professor Richard  
5 L. Settle in The Washington State Environmental Policy Act (1987) at  
6 p. 78:

7 "By virtue of their source, statutory exemptions are  
8 limited by their own terms and, conceivably, the  
9 constitutional equal protection requirement. Unlike  
10 administrative categorical exemptions which are subject to  
11 the general qualification that they may not include "major  
12 actions significantly affecting the quality of the  
13 environment," statutory exemptions immunize the specified  
14 activities from SEPA requirements regardless of their  
15 environmental significance." (Emphasis added.)

16 We conclude that these comments, if considered in their full context,  
17 are supportive of the view that forest practices exemptions from SEPA  
18 must be made with regard to environmental significance. Professor  
19 Settle's comment, above, addresses in the aggregate, exemptions  
20 within SEPA for 1) specified agricultural irrigation, RCW 43.21C.035,  
21 2) school closures, RCW 43.21C.038, 3) actions under a declared  
22 Governor's state of emergency, RCW 43.21C.210, 4) incorporation of a  
23 city or town, RCW 43.21C.220, 5) development of a housing finance

---

24 <sup>6</sup> The Supreme Court resolved an action for damages which followed  
25 an unappealed decision by the Island County Superior Court that WAC  
26 222-16-050 was invalid. Noel v. Cole, Island County Cause No. 9806,  
27 Kershner, J.

1 plan, RCW 43.21C.230, 6) emergency recovery from Mt. St. Helen's  
2 eruption, RCW 43.21C.500, and 7) the forest practices provision at  
3 issue, RCW 43.21C.037, cited above. Of these, none save the forest  
4 practices provision mention impact on the environment as a limitation  
5 of the exemption. Thus the conclusion drawn in the second sentence of  
6 Professor Settle's comments that "statutory exemptions immunize the  
7 specified activities from SEPA regardless of their environmental  
8 significance" must be tempered by the underscored language in the  
9 first sentence of his comments that statutory exemptions "are limited  
10 by their own terms." The terms of SEPA's forest practices exemption  
11 includes the limitation that forest practices with a potential for a  
12 substantial impact on the environment require an evaluation as to  
13 whether or not a detailed statement must be prepared pursuant to  
14 SEPA. The broad exemption of WAC 222-16-050 is administrative and not  
15 statutory.

16 XVIII.

17 The challenge to WAC 222-16-050 herein is not barred by laches,  
18 waiver or estoppel.

19 XIX.

20 The circumstances listed in WAC 222-16-050(1) as invoking the  
21 Class IV Special may properly be interpreted as those particular  
22 circumstances associated with forest practices which may be expected  
23 to occur with some frequency and which are known to be clearly capable  
24 of having a potential for substantial impact on the environment.  
25

26 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

27 FPAB Nos. 89-12 & 89-13



1 It certainly is not practicable nor even possible to determine in  
2 advance of every actual permit application all of the particular  
3 forest practices and associated environmental conditions that will  
4 have the potential for substantial impact on the environment. Hence  
5 any list that purports to exclusively define Class IV - Special action  
6 is inconsistent with the Forest Practices Act and SEPA.

7 XX

8 The challenged rule, WAC 222-16-050, purports to exempt forest  
9 practices which have a potential for a substantial impact on the  
10 environment from the statutory provisions of RCW 76.09.050(1)  
11 requiring an environmental evaluation by DNR. In this respect,  
12 WAC 222-16-050 is invalid.

13 XXI.

14 SEPA. The DNR has both the authority and the responsibility to  
15 determine for itself the compliance of a forest practices application  
16 with the classifications of the Forest Practices Act. RCW  
17 76.09.050(5). (Text at Conclusion of Law VI, supra.) The DNR should  
18 not rely solely upon WAC 222-16-050 in making its determination, as  
19 was done here. That rule exceeds the statutory authority of RCW  
20 76.09.050(1), and cannot be applied to determine, as a matter of law,  
21 which forest practices are Class III. From the evidence before us,  
22 however, we conclude that the proposed forest practices do not have a  
23 potential for a substantial impact on the environment and were  
24 properly classified as Class III under RCW 76.09.050(1).  
25

26 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

27 FPAB Nos. 89-12 & 89-13

(33)

XXII.

Appellants contend that the applications should have been classified "as received" with the Lake Roesiger basin included. We disagree. Separation of the Lake Roesiger basin for future consideration was not improper segmentation under SEPA rules defining a proposal. These provide that proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. WAC 197-11-060(3)(b). However, the "closely related" feature is defined to require that proposals:

- 1) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
- 2) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation. WAC 197-11-060(3)(b).

Neither of the above is descriptive of the proposed logging inside versus outside the Lake Roesiger basin as stated in the these applications. Rather, the proposed logging outside the basin can occur independently of that proposed inside the basin. This distinguishes the facts here, also, from Merkle v. Port of Brownsville, 8 Wn. App. 844 (1973). Compare Seattle Audubon Society, et al. v. Department of Natural Resources and Scott Paper Company, FPAB No. 87-5 (1989). Unlike Owens, et al. v. Department of Natural Resources and Chamberlain Farms, FPAB No. 87-6 (1988) we see no

coercive effect that the approved logging would have on the future consideration of logging inside the basin. Consideration of the applications exclusive of the Lake Roesiger basin was proper under SEPA.

#### XXIII.

Appellants next contend that the identification of "priority" issues under the TFW agreement is tantamount to classifying the applications as Class IV applications with potential for a substantial impact on the environment. We disagree here, also. Although the classifications of the Forest Practice Act pre-date TFW, we see no compelling reason why the TFW process cannot aid in DNR's determination of whether an application has a potential for a substantial impact on the environment. The ID Team approach of TFW is consistent with SEPA's directive to use a systematic, interdisciplinary approach. RCW 43.21C. 030(2)(a). While we do not conclude that TFW procedure is a substitute for SEPA evaluation, it can serve as an indicator of whether that evaluation is required.

#### XXIV.

Lastly, appellants contend that applications should be classified with regard to the cumulative effects of past, present, and foreseeable future applications with similar impacts. We agree with this in part. First, the term "impact" is defined under WAC 197-11-752 of the SEPA rules as "the effects or consequences of

1 actions . . . ". See also WAC 197-11-060(4)(e) specifying cumulative  
2 impacts. The impact of these proposed operations on water quality,  
3 wildlife and other elements of the environment should be asessed in  
4 light of previous forest operations. The "effects or consequences of  
5 actions" proposed in present applicatons may intensify when added to  
6 actions already approved. Nothing in SEPA or the Forest Practices Act  
7 compels DNR to consider the forest practice application in isolation  
8 from previously approved applications in the same vicinity. The  
9 conclusion which we reach that these applications do not have a  
10 potential for a substantial impact on the environment is made with  
11 consideration of the cumulative effect of these and past forest  
12 practices approvals. We do not, however, deem it appropriate for DNR  
13 to assess future applications not yet filed when evaluating present  
14 applications. "A proposal exists when an agency is presented with an  
15 application . . . " WAC 197-11-055(2)(a).

16 XXV.

17 The DNR's classification of these applications as Class III  
18 exempts them from the requirements for preparation of a detailed  
19 statement under SEPA. RCW 76.09.050(1). This excludes also the  
20 threshold determination requirement. Id. and Settle, supra, at p. 78  
21 (last paragraph). SEPA may have a supplemental substantive effect in  
22 approval or denial of forest practices applications. See, e.g. RCW  
23 43.21C.060. However, we do not find these approvals lacking in that  
24 respect. We conclude that DNR's approval of these applications was  
25

1 consistent with SEPA.

2 XXVI.

3 Forest Practices Act. Appellant, Washington Environmental  
4 Council, contends that the conditions of these approvals are  
5 inadequate and unenforceable. We hold the conditions to be adequate,  
6 and therefore turn to whether they are enforceable. An issue arises  
7 here as to conditions not directly based upon forest practices  
8 regulations, but necessary to protect public resources in the context  
9 of this specific site. Public resources are defined to include water,  
10 fish, wildlife and capital improvements of the state or its political  
11 subdivisions. RCW 76.09.020(13). The DNR may, even after approving  
12 applications, issue regulatory orders to avoid "material damage to a  
13 public resource." RCW 76.09.080(1)(C) and RCW 76.09.090. In this  
14 respect, DNR urges:

15 . . . In essence, these provisions grant the  
16 Department authority to impose more stringent requirements  
17 than those in the regulations if the DNR determines they  
18 are necessary to prevent material damage to a public  
19 resource. This is a recognition by the legislature and  
20 the FPB that regulations cannot anticipate every  
site-specific situation, and that there may exist unique  
or unusual situations, not contemplated by the FPB where  
the regulations alone are insufficient to prevent material  
damage to public resources.

21 DNR has interpreted the authority to require more  
22 stringent conditions after the forest practice has  
23 commenced as impliedly granting it the authority to place  
24 those same conditions initially on the application where  
DNR knows in advance of the potential for material damage  
to a public resource that will not be adequately mitigated  
by the regulations. . . . (Emphasis in original.)  
25 Pre-Hearing Brief of DNR, pages 42-43.

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

27 FPAB Nos. 89-12 & 89-13 . (37)

1 We agree. The DNR has authority to prescribe site-specific,  
2 preventive conditions to a forest practices approval which are  
3 necessary to prevent material damage to a public resource. In this  
4 case, certain conditions go farther than the forest practices  
5 regulations literally prescribe. These were set with cooperation from  
6 the applicants. Yet under the authority of DNR to protect against  
7 material damage to a public resource, we hold each of the conditions  
8 of these approvals to be enforceable under the Forest Practices Act.

9 XXVII.

10 Our conclusions pertinent to SEPA concerning the separation of  
11 the Lake Roesiger basin (Conclusion of Law XXII, supra), the utility  
12 of the TFW process (Conclusion of Law XXIII, supra) and cumulative  
13 impacts (Conclusion of Law XXIV, supra), apply also to DNR's  
14 application of the Forest Practices Act. We conclude that DNR's  
15 approval of these applications was consistent with the Forest  
16 Practices Act and forest practices regulations.

17 XXXII.

18 In summary, the forest practices approvals, as conditioned, do  
19 not have a potential for a substantial impact on the environment nor  
20 for material damage to a public resource, and are consistent with  
21 SEPA, the Forest Practices Act and forest practices regulations,  
22 except for reliance upon WAC 222-16-050 which exceeds statutory  
23 authority.

XXXIII.

Any Finding of Fact which is deemed to be a Conclusion of Law is hereby adopted as such. From these Conclusions of Law, the Board enters this

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27


ORDER

The approval by Department of Natural Resources of the forest practices applications of Golden Spring International, Inc., and TAT (USA) Corporation is hereby affirmed.


DONE at Lacey, WA, this 13<sup>th</sup> day of November, 1989.

FOREST PRACTICES APPEALS BOARD

  
NORMAN L. WINN, Chairman

  
CLAUDIA K. CRAIG, Member

  
DR. MARTIN R. KAATZ, Member

  
WILLIAM A. HARRISON  
Administrative Appeals Judge

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
FPAB Nos. 89-12 & 89-13



**CONCURRING OPINION**

CONCURRING OPINION

This appeal raises a number of important issues of public policy which are likely to be raised in future appeals and also in dealings between applicants, concerned citizens, and the Department of Natural Resources (DNR). This concurring opinion will amplify and expand on some of the findings set forth in our Order.

The lands in question are low elevation timber lands classified site 1 and site 2 lands. The soils are fertile and well drained. There are many existing logging roads in place and little additional road construction is required for further harvesting. The Board noted on its field trip that there is very rapid regeneration on adjacent clear cuts. Testimony during the hearing indicated that these lands will be replanted during the next planting season in 1990, and that it is likely that the new trees will be about 6 feet high in five years. After ten years, the trees will be about 15 feet high. The terrain is gently rolling, and testimony at the hearing indicated that there was little probability of soil erosion!

These factors are important in the Board's consideration of the issues raised in this appeal. The lands under consideration are some of the best timber growing lands in the state. The economic viability of the timber industry is dependent upon maintaining an adequate timber base. The state and the county derive significant tax revenues from timber harvesting activities, and substantial employment results from the timber industry and the secondary effects of timber harvesting in the local economy.

1 If the timber industry is to remain economically healthy, it is  
2 important that highly productive, low elevation sites currently in  
3 timber production be available for harvesting, replanting, and future  
4 timber production. Much of the land which is remote from population  
5 centers is in the higher elevation areas in the mountains where timber  
6 growing conditions are much less favorable and environmental concerns  
7 are much more acute. Both the Forest Practices Board and the  
8 Department of Natural Resources recognize that there are important  
9 social concerns which result from logging in areas which are becoming  
10 urbanized. This Board shares those concerns. Both the Forest  
11 Practices Board and the Department of Natural Resources have ongoing  
12 studies which address some of the significant issues raised in this  
13 appeal.

14 The testimony during the hearing establishes that both TAT and  
15 GSI have gone to considerable lengths to address and mitigate  
16 environmental concerns raised by citizens living around Lake  
17 Roesiger. Both GSI and TAT will use a "feller-buncher" which utilizes  
18 large, low inflation rubber tires. This equipment represents a very  
19 significant capital expense, in excess of one million dollars.  
20 Testimony during the hearing indicated that one of the logging  
21 contractors had purchased this equipment specifically for these  
22 harvest applications. Testimony at the hearing indicated that this  
23 equipment results in the likelihood of significantly less soil  
24 compaction and other environmental problems compared to the use of  
25

1 more traditional logging equipment.

2 Both GSI and TAT have voluntarily agreed to general and special  
3 conditions on their permits which are much more stringent than  
4 conditions normally imposed. One witness testified that these were  
5 the most stringent conditions ever imposed in the state of  
6 Washington. There was testimony that compliance with these conditions  
7 will result in economic loss to the companies, although no specific  
8 dollar figure was mentioned. Foresters for GSI and TAT worked with  
9 the DNR in arriving at these conditions, and both GSI and TAT  
10 voluntarily agreed to the stringent conditions. The applicants'  
11 acceptance of these conditions was probably motivated in considerable  
12 part by the intense public scrutiny and public controversy over these  
13 harvest applications. Nevertheless, we personally believe that GSI  
14 and TAT are to be commended for voluntarily agreeing to these  
15 stringent conditions.

16 Both GSI and TAT participated in a Timber/Fish/Wildlife review  
17 with the Department of Ecology, the Department of Wildlife, the  
18 Department of Fisheries, and Indian tribes. The comments of these  
19 experts were considered by the DNR in reviewing the applications and  
20 drafting the conditions. The applicants granted DNR two time  
21 extentions so that the conditions could be adequately addressed.  
22 Members of the public living in the vicinity of Lake Roesiger also  
23 participated in one field trip to look at some of the sites. GSI gave  
24 Snohomish County permission to go on its property after this appeal  
25

26 CONCURRING OPINION  
27 FPAB 89-12, 89-13

(3)

1 was filed to obtain further information in preparation for the appeal.

2 This Board recognizes that the TFW process is a voluntary  
3 process. GSI and TAT had very recently purchased this property in  
4 Snohomish County and had no history of participation in the TFW  
5 process. Both applicants are to be commended for participating in the  
6 TFW process and consenting to the stringent conditions on the  
7 applications which resulted, in part, from that TFW process.

8 The TFW process is the result of long and often difficult  
9 negotiations between environmental organizations, timber  
10 organizations, state agencies, and Indian tribes. All those parties  
11 believed that the process of handling disputes over logging practices  
12 through administrative appeals and Superior Court litigation was not  
13 the most efficient method of resolving environmental concerns. The  
14 TFW process is intended to bring an interdisciplinary approach to  
15 specific environmental concerns in connection with specific harvest  
16 applications. Often the TFW approach will result in additional  
17 expertise being available to the DNR and a better result achieved in  
18 terms of environmental protection. We believe that the TFW approach  
19 is an important and practical method of resolving environmental  
20 concerns, short of adversary proceedings. If applicants go through  
21 the TFW process and are then faced with adversary proceedings,  
22 applicants have less incentive to participate in the TFW process.  
23 Additionally, we recognize and encourage efforts of the TFW  
24 participants, the DNR, and the Forest Practices Board to include  
25

1 counties, local citizen groups, landowners and other parties not  
2 involved in the original TFW agreement to become a part of the  
3 process.

4 It is significant that representatives of the Department of  
5 Ecology, Department of Wildlife, and Department of Fisheries who have  
6 participated in the TFW process testified at the hearing. Some of  
7 those experts had concerns over the cumulative impacts of these timber  
8 sales. However, each of them testified that their concerns as to  
9 these particular sales were adequately addressed through the TFW  
10 process and the conditions that were imposed on the harvest  
11 applications. We were impressed with the knowledge and candor of  
12 these witnesses. They are to be commended for their desire to protect  
13 the environment and the public resources which are the particular  
14 responsibility of their respective agencies.

15 Several representatives of the DNR testified at the hearing. It  
16 is clear that these applications received an unprecedented level of  
17 review within the Department. Commissioner Boyle met with the  
18 Snohomish County Council to discuss concerns raised by the Council and  
19 residents living near Lake Roesiger. Commissioner Boyle informed the  
20 County Council that many of the issues raised were the subject of  
21 ongoing studies by the Forest Practices Board and the DNR and that he  
22 had requested an accelerated work program to complete those studies.  
23 These studies include cumulative impacts of logging, size of  
24 clearcuts, and logging in urbanized areas.

1 We find it significant and encouraging that the DNR imposed  
2 conditions beyond the literal requirements of the Forest Practice  
3 Regulations. Several employees of the DNR testified that they  
4 believed that they had authority to impose additional conditions where  
5 necessary to protect public resources. We agree with this position  
6 and believe it is fully consistent with and even mandated by the  
7 Forest Practices Act and the State Environmental Policy Act.

8 The Forest Practices Appeals Board has ruled that the State  
9 Environmental Policy Act does apply to forest practices other than the  
10 limited number of practices enumerated in WAC 222-15-050. The Forest  
11 Practices Act provides in RCW 43.21C.037 that Class IV Special forest  
12 practices requiring compliance with SEPA includes any forest practices  
13 "which have a potential for a substantial impact on the environment."  
14 We forcefully reject the interpretation that only the five practices  
15 listed in WAC 222-16-050 have a potential for substantial impact on  
16 the environment. Clearly, there are numerous other forest practices  
17 which, depending upon the terrain, the equipment used, soil  
18 conditions, and other factors, could have substantial impact on the  
19 environment. The Forest Practices Board has extensively studied other  
20 forest practices in 1979-80. That work need not be repeated because  
21 we believe that no list can be exclusive.

22 Snohomish County has persuasively argued in its brief that SEPA  
23 is an environmental statute which provides an overlay which  
24 compliments other statutory regulations. We agree. Numerous cases  
25

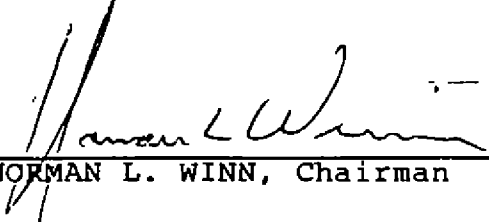
1 stress the strong public policy of the state to protect the  
2 environment. This public policy applies to timber harvesting as well  
3 as normal construction activities.

4 Based upon the specific facts of this case, we concur with the  
5 Board's decision that an environmental impact statement was not  
6 required in connection with these harvest applications. We emphasize  
7 that this harvesting occurs on low elevation site 1 lands in gentle  
8 terrain, with very little new road construction required. All of the  
9 agency personnel agreed that the stringent conditions imposed on the  
10 applications were adequate to prevent or mitigate environmental  
11 concerns. We emphasize these facts because we believe that somewhat  
12 different facts on future applications may well require preparation of  
13 an E.I.S. or other SEPA procedures. We would encourage the DNR to  
14 supplement the SEPA checklist pursuant to WAC 197-11-335 to elicit  
15 additional information more pertinent to forest practices. In that  
16 connection, the scoping process and preparation of a mitigated DNS may  
17 be an efficient process to achieve SEPA compliance.

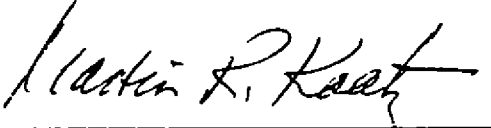


1 With these additional comments, we concur in the foregoing  
2 decision.

3 DONE at Lacey, WA, this 13<sup>th</sup> day of November, 1989.  
4

5  
6   
7 NORMAN L. WINN, Chairman

8  
9   
10 CLAUDIA K. CRAIG, Member

11  
12   
13 DR. MARTIN R. KAATZ, Member  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27